



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Petro Star, Inc.

File: B-248019

Date: July 27, 1992

Ronald H. Uscher, Esq., Bastianelli, Brown & Touhey, for the protester.

John J. Ralston, Esq., Defense Logistics Agency, for the agency.

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DIGEST

An agency's decision to acquire aviation fuel via a sole-source award is justified where the agency's facilities are limited to receiving the fuel by pipeline and only one source can deliver the fuel by pipeline.

DECISION

Petro Star, Inc. protests the sole-source award of a contract to MAPCO Alaska Petroleum, Inc. under request for proposals (RFP) No. DLA600-92-R-0080 issued by the Defense Logistics Agency (DLA), Defense Fuel Supply Center (DFSC), for JP-8 aviation fuel to be used at Eielson Air Force Base, Alaska. Petro Star argues that DFSC improperly conducted this procurement as a sole source acquisition.

We deny the protest.

On March 9, 1992, DFSC published a notice in the Commerce Business Daily (CBD) announcing DFSC's intention to award a sole source contract to MAPCO for pipeline delivery of 5,000,000 gallons of JP-8 fuel to Eielson during the period of June 1 through September 30, 1992. MAPCO is the only source capable of pipeline delivery to Eielson. Eielson is in the process of converting to JP-8 fuel from JP-4 fuel and this is the first large-scale requirement of JP-8 fuel for Eielson.

On April 17, DFSC's commanding officer authorized the sole-source award pursuant to 10 U.S.C. § 2304(c)(1) (1988). This provision of the Competition in Contracting Act of 1984 (CICA) authorizes other than full and open competition where there exists only one or a limited number of sources. The

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justification described Eielson's limited facilities for receiving aviation fuel, and concluded that pipeline delivery was the only acceptable method of delivery and that MAPCO is therefore the only available source at this time. The estimated dollar value of the award is \$3,650,000.

Petro Star had previously informed DFSC of its desire to deliver JP-8 fuel by tanker truck.¹ On March 19, subsequent to DFSC's announcement in the CBD, Petro Star protested the sole-source acquisition to our Office.² Petro Star asserts that DFSC unreasonably restricted the JP-8 procurement to pipeline delivery; according to Petro Star, the agency's minimum needs could also be met by tanker truck delivery, and therefore this procurement should have been conducted under full and open competition procedures.

While the overriding mandate of CICA is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), CICA permits noncompetitive acquisitions in specified circumstances, such as when the items needed are available from only one responsible source, 10 U.S.C. § 2304(c)(1); Elbit Computers, Ltd., 69 Comp. Gen. 591 (1990), 90-2 CPD ¶ 26; Kollsman, A Div. of Sequa Corp.; Applied Data Tech., Inc., B-243113; B-243113.2, July 3, 1991, 91-2 CPD ¶ 18. A sole-source award is justified where the agency reasonably concludes that only one known source can meet the government's needs within the required time. Kollsman, A Div. of Sequa Corp.; Applied Data Tech., Inc., supra.

We find that DFSC reasonably concluded that JP-8 fuel delivery to Eielson was necessarily restricted to pipeline and therefore the sole-source procurement is justified. Eielson has three bulk storage areas for jet fuel (designated E-2, E-6, and E-11). All three of these areas are connected to the Fairbanks/Eielson Pipeline System. Two of these areas, E-2 and E-11, are also connected to rail offloading facilities. These rail offloading facilities are enclosed by fences and are not currently accessible by

¹DFSC procured a small quantity (100,000 gallons) of JP-8 fuel this past winter for testing purposes. When Petro Star learned it could not compete because Eielson was unable to accommodate tanker truck delivery, Petro Star protested to DFSC, which denied the protest.

²DFSC issued the RFP to MAPCO on March 24, 1992. MAPCO submitted its best and final offer on May 6. DFSC awarded the contract to MAPCO by May 21, after determining, in accordance with 4 C.F.R. § 21.4(a) (1992), that urgent and compelling circumstances existed that justified overriding the stay on contract award.

tanker truck. The rail offloading facilities have not been used on a regular basis since 1978, when MAPCO connected to the Fairbanks/Eielson pipeline. A small portion of E-2 is dedicated to arctic diesel fuel and has offloading facilities for trucks; however, this truck offloading facility is not connected to the jet fuel storage tanks. Otherwise, none of these storage areas is constructed to receive fuel shipments by truck.¹ Rail transportation of jet fuel declined since 1978 because MAPCO, located near the Fairbanks/Eielson pipeline, had a competitive advantage over other contractors which had to ship JP-4 fuel by rail at least 500 miles. As a result, MAPCO's prices were lower than its competitors', and MAPCO therefore received every jet fuel contract during this period. The rail offloading facilities now are in poor condition due to nonuse. Additionally, the facilities do not meet current environmental regulations.

Beginning in 1989, DFSC began restricting non-emergency delivery of jet fuel to Eielson to pipeline only. Since MAPCO was the only source capable of delivering by pipeline, the procurement became a de facto sole-source acquisition. In 1991, DLA started conducting the procurement for JP-4 jet fuel as a formal sole-source acquisition in part because of our decision in Sun Ref. and Mktg. Co.; Barrett Ref. Corp., B-239973; B-239973.2, Oct. 17, 1990, 90-2 CPD ¶ 305, which held that a de facto sole-source award must comply with statutory and regulatory requirements for the use of noncompetitive procedures.

Petro Star asserts that it can satisfy Eielson's needs. It states that while it did not produce JP-4 fuel, it does produce JP-8 fuel and that its refinery is adjacent to MAPCO's refinery, thus eliminating any price advantage MAPCO had with respect to JP-4. Petro Star asserts that Eielson has the capability to receive JP-8 fuel by truck with a minor alteration to a fence that would permit trucks access to the rail offloading facilities.

DFSC responds that Eielson does not have adequate facilities to accommodate delivery of JP-8 fuel by truck. The rail offloading facilities, which arguably could be modified for this use, are corroded from lack of use. Also, the facilities do not have the spill prevention and containment

¹Eielson has other bulk storage areas that are equipped with tanker truck offloading facilities. However, these areas store non-aviation fuels, such as arctic diesel fuel and automotive gasoline. The delivery quantities for these fuels are much smaller than for jet fuel and are inappropriate for the high volume deliveries required here.

facilities required by federal and state law.⁴ See 40 C.F.R. § 112.7 (1991); Alaska Stat. § 46.04.030 (1991). The Alaska Department of Environmental Conservation, in a letter dated April 20, expressed its opposition to the use of the offloading facilities due to the physical condition of the facilities and the lack of spill prevention and containment facilities.

Although Petro Star disputes the condition of the facilities and Eielson's ability to use them, it does not dispute the applicability of the environmental regulations. Therefore, even assuming Petro Star's fence alteration proposal was practicable, Petro Star's proposal fails to remedy the environmental hazard that would exist with use of the antiquated rail offloading facilities, which would be exacerbated by high volume deliveries of jet fuel by truck. Indeed, these were the motivating factors that led to the decommissioning of the facilities in 1989 and are the reasons why delivery remains restricted to pipeline.

Petro Star argues that, notwithstanding the environmental regulations, truck delivery should be allowed here because DFSC accepted rail delivery in a recent shipment of JP-8 fuel to Eielson. Although a delivery of 100,000 gallons of JP-8 fuel was made to Eielson by rail in January 1992, the record shows that this was a single shipment required in an emergency situation. The emergency arose because the new JP-8 fuel had to be tested before Eielson switched from JP-4 fuel, but the pipeline was being used for the shipment of JP-4 fuel and was not available for JP-8 fuel. DFSC determined that the need for the JP-8 fuel for testing outweighed the safety and environmental risk created by a single delivery at the rail offloading facilities. These exigent circumstances no longer exist. Furthermore, although DFSC's emergency use of the rail offloading facilities apparently did not comply with environmental regulations, this does not relieve DFSC from its future obligations to comply with federal and state laws.

During the course of this protest, Petro Star has offered to reduce its demand to compete on the entire 5,000,000 gallons of fuel, claiming that this reduction will minimize DFSC's traffic and environmental concerns. We do not think Petro Star's offer overcomes DFSC's concerns that support its sole-source justification. Even with reduced truck deliveries, there is still an unacceptable risk of environmental damage in light of the antiquated facilities and the absence of spill prevention and containment facilities.

⁴DFSC is subject to the federal and state environmental laws. 40 C.F.R. § 112.1(c); Alaska Stat. § 46.04.900(13).

Petro Star also argues that, since Eielson's rail offloading facilities were allowed to go unused over the years and have not been earlier upgraded to current environmental standards, DFSC failed to adequately plan for this procurement and a sole-source award cannot be justified. It is true that an agency may not make a sole-source award where the need for the sole-source acquisition was brought about by a lack of advance planning by procurement officials, 10 U.S.C. § 2304(f)(5)(A). However, a change in conditions does not generally indicate a lack of advance planning by an agency; in fact, the changed conditions may warrant a sole-source award in the short-term to allow the agency to adjust to the changed conditions. Kollsman, A Div. of Sequa Corp.; Applied Data Tech., Inc., supra.

DFSC's need for the sole-source acquisition here was not due to a lack of advance planning, but rather a change in conditions. As explained previously, Eielson's rail offloading facilities were dormant for so many years because MAPCO was a de facto sole-source after it linked to the Fairbanks/Eielson pipeline.⁵ Conditions have now changed with Eielson's transition to JP-8 fuel and the resulting emergence of Petro Star as a potential MAPCO competitor.

DFSC has responded reasonably to these changed conditions. The record shows that as early as July 1991, DFSC anticipated the transition to JP-8 fuel and concluded that resurrecting the rail offloading facilities would again foster competition. In this regard, DFSC is currently upgrading the E-11 offloading facilities to permit delivery by tanker truck in accordance with applicable environmental standards. DFSC is also installing a flange on the Fairbanks/Eielson pipeline a half mile from Petro Star's facilities, which will give Petro Star the option of linking to the pipeline. All of this construction is expected to be completed on or before October 1, 1992, so full and open competition in future procurements may be achieved.⁶ We

⁵DFSC had found that the cost of renovating the offloading facilities was not warranted since it was unlikely that MAPCO's competitors could overcome MAPCO's significant competitive advantage.

⁶In a September 5, 1991, letter, DFSC requested an expedited project assessment from the Army Corps of Engineers to ensure that design and construction could occur in 1992. However, the record contains evidence that the renovated truck offloading facilities may not be completed until October 1, 1993. Even if DFSC does not complete the improvements until 1993, the record still fairly shows that the agency's response has been prompt and DFSC is not guilty of a lack of advance procurement planning.

think DFSC's response to the changed conditions has been swift, considering the short Alaskan construction season,⁷ the lead time which the Army Corps of Engineers needed to assess the project, and the time DFSC needs to design and complete the renovations.

Petro Star further asserts that the Justification & Approval for the sole-source procurement was not signed by the appropriate level official and, therefore, is not valid. We will not object to a reasonably based, sole-source award where the agency has substantially complied with the procedural requirements of CICA, 10 U.S.C. § 2304(f). These requirements include publication of the required CBD notice and a written justification for, and appropriate higher level approval of, the contemplated sole-source action. Kollisman, A Div. of Sequa Corp.; Applied Data Tech., Inc., supra.

The Justification & Approval for a sole-source procurement with a value greater than \$1 million, but less than or equal to \$10 million, as here, must be signed by the head of the procuring activity or a designee meeting certain qualifications. 10 U.S.C. § 2304(f)(1)(B)(ii); Federal Acquisition Regulation (FAR) § 6.304(a)(3). DFSC is the procuring activity in this instance. See Defense FAR Supplement (DFARS) § 202.101. The Justification & Approval here was signed by the commanding officer of DFSC. Therefore, DFSC complied with the procedural requirements of CICA and FAR.

Nevertheless, Petro Star argues that Defense Logistics Acquisition Regulation (DLAR) § 6.304(a)(4)(70)(2) requires approval from a higher level official than stipulated in CICA and FAR, namely the DLA Competition Advocate. In response, DFSC states, and the record confirms, that DLAR § 6.304(a)(4)(70)(2) was deleted as of November 13, 1991, and replaced in part with DLAR § 6.304(a)(4)(A)(1)(91), which only requires approval from the DLA Competition Advocate for procurements exceeding \$50,000,000. Petro Star asserts that this revision was not published in the Federal Register and, therefore, is void. DFSC responds that neither the original DLAR provision nor the revision was required to be published because they involve internal operating procedures that implement the higher level FAR and DFARS. Petro Star disagrees with DFSC's classification of the DLAR provision as an internal operating procedure, asserting that it was required to be published to be effective.

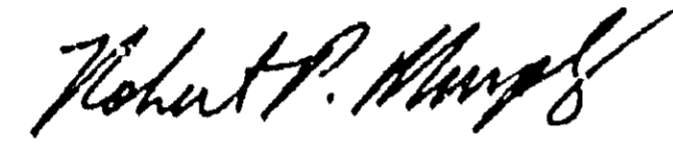
Agencies are required to publish agency acquisition regulations in the Federal Register, see 5 U.S.C. § 552(a)(1) (1988); FAR § 1.301(b), although agencies are not generally

⁷The construction season for this area of Alaska lasts only a few months and does not begin until May.

required to publish issuances that merely implement or supplement higher level issuances that have previously undergone the public comment process. FAR § 1.301(b). Neither section 6.304(a)(4)(70)(2) nor the revision, section 6.304(a)(4)(A)(1)(91), of the DLAR was ever published in the Federal Register or in the Code of Federal Regulations (C.F.R.).⁸ Therefore, under Petro Star's reasoning that an unpublished regulation has no effect, neither of these DLAR provisions would apply,⁹ and only the procedural requirements, as stated in CICA and FAR, would apply insofar as the protester is concerned. As stated above, DFSC has satisfied these requirements. In any case, the sole-source justification satisfied current DLAR requirements since it was approved by DFSC's commanding officer.

Based on our review of the record, we find that DFSC properly conducted this procurement as a sole-source award.

The protest is denied.


for James F. Hinchman
General Counsel

⁸The only mention of DLAR in the Federal Register was on June 29, 1984, when the pre-FAR Defense Logistics Procurement Regulation (DLPR), which was published in the C.F.R., was repealed and replaced with the DLAR implementing the FAR. 49 FR 26,721 (1984). The DLAR was never published in the Federal Register or the C.F.R.

⁹Petro Star's precise argument is that the revised regulation has no legal effect because it was not published. However, Petro Star does not explain why this same reasoning is not equally applicable to the original regulation. If Petro Star's argument is valid, we know of no logical distinction in this case between the original unpublished regulation and its unpublished revision that would warrant restricting the argument solely to the revised regulation.